

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

WALTER MARIO FERRANDO,

Defendant and Appellant.

C042104

(Super. Ct. Nos. 01F6332,
02F1115)

APPEAL from a judgment of the Superior Court of Shasta County, Bradley L. Boeckman, J. Affirmed.

Law office of Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson and Jo Graves, Assistant Attorneys General, Charles A. French and John A. Thawley, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of STATEMENT OF FACTS and part I of the DISCUSSION.

Defendant Walter Mario Ferrando appeals his conviction for opening or maintaining a place for the use or sale of methamphetamine (Health & Saf. Code, § 11366)¹, as well as the sentence imposed following his conviction. He contends (1) there was insufficient evidence to support the instruction and conviction on an aiding and abetting theory and (2) the court erred in refusing to sentence him under Proposition 36.

In the published portion of the opinion, we shall conclude defendant was ineligible for Proposition 36 sentencing. In the unpublished portion of the opinion, we reject defendant's other contention. We shall therefore affirm the judgment.

STATEMENT OF FACTS

On September 10, 2001, agents of the Shasta Interagency Narcotics Task Force conducted a warrant search of defendant's residence. In defendant's bedroom, they found a pack of cigarettes, inside of which there was 3.06 grams of methamphetamine. Also in the home, officers found eight unused Ziploc baggies, a digital scale, a handgun, a coin purse containing a syringe, needle, cotton and a spoon with residue.

In addition to searching defendant's home, agents also searched a trailer on the property in which Nick Leslie and his girlfriend, Nonnie Brown, lived, as well as a number of sheds on the property. In the course of their search, officers found

¹ Undesignated statutory references are to the Health and Safety Code.

22.5 grams of methamphetamine, packaging materials, drug paraphernalia, and firearms. Ultimately, Leslie pled guilty to felony sales.

Leslie acted as a caretaker of defendant's property while defendant, a long-haul truck driver, was on the road. Defendant's sons Danny and Matthew also lived in the house. Occasionally, Leslie would give defendant methamphetamine. Leslie had full access to defendant's house and sometimes used the home when he was selling drugs.

Defendant's son Matthew was also a methamphetamine user. He told Officer Barrett that defendant sold methamphetamine, but Leslie sold greater quantities. Matthew told Officer Barrett that Leslie sold drugs from his trailer, and that Matthew bought his drugs on the property.

Matthew also told Officer Barrett that there were "people coming [to the property at] all hours of the day and night," and "[y]ou might as well hang a red flag out." Danny confirmed that traffic to the property increased when Leslie moved into the trailer.

Matthew's girlfriend, Tabatha, was also a methamphetamine user. She told Officer Barrett that she was aware of the drug activity but tried to mind her own business. She also stated that Nick sold drugs but kept it away from her kids. She got her methamphetamine from Matthew, who would buy it either from Nick or defendant.

Defendant claimed he was aware that Leslie used drugs but did not know Leslie was selling drugs or storing them on his property. Defendant had "an idea" that his son Matthew was using drugs but did not know that Tabatha was using drugs.

RELEVANT PROCEDURAL HISTORY

Defendant was charged with two counts of possession of methamphetamine (§ 11377, subd. (a)), one count of possession of methamphetamine for sale (§ 11378), one count of maintaining a place for the use or sale of methamphetamine (§ 11366), a misdemeanor count of possession of less than an ounce of marijuana (§ 11357, subd. (b)), and one count of sale or transportation of methamphetamine (§ 11379, subd. (a)).

Following a jury trial, defendant was convicted on all counts, except for possession of methamphetamine for sale, on which he was acquitted.

Defendant requested that he be sentenced under Proposition 36. The court denied defendant's request, suspended imposition of sentence, and placed him on formal probation for three years, conditioned on his serving 180 days in county jail.

DISCUSSION

I.

Defendant contends his conviction for maintaining a place for the use or sale of methamphetamine must be reversed, because there was "Insufficient Evidence to Support the Instruction and Conviction on an Aiding and Abetting Theory." We disagree.

"The test for determining whether instructions on a particular theory of guilt are appropriate is whether there is substantial evidence which would support conviction on that theory. [Citation.] To determine whether there is substantial evidence to support a conviction we must view the record in a light most favorable to conviction, resolving all conflicts in the evidence and drawing all reasonable inferences in support of conviction. We may conclude that there is no substantial evidence in support of conviction only if it can be said that on the evidence presented no reasonable factfinder could find the defendant to be guilty on the theory presented. [Citation.]" (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 528-529.)

"[T]he law imposes criminal liability upon all persons 'concerned' in the commission of a crime. ([Penal Code,] § 31.)" (*Nguyen, supra*, 21 Cal.App.4th 518, 529.) "A person is 'concerned' and hence guilty as an aider and abettor if, with the requisite state of mind, that person in any way, directly or indirectly, aided the actual perpetrator by acts or encouraged the perpetrator by words or gestures." (*Ibid.*)

"Mere presence at the scene of a crime is not sufficient to constitute aiding and abetting, nor is the failure to take action to prevent a crime, although these are factors the jury may consider in assessing a defendant's criminal responsibility. [Citation.] Likewise, knowledge of another's criminal purpose is not sufficient for aiding and abetting; the defendant must also share that purpose or intend to commit, encourage, or

facilitate the commission of the crime. [Citation.]" (*Nguyen, supra*, 21 Cal.App.4th 518, 529-530; see *People v. Lee* (2003) 31 Cal.4th 613, 623-624.)

Section 11366 provides, in pertinent part: "Every person who opens or maintains any place for the purpose of unlawfully selling, giving away, or using any controlled substance . . . shall be punished by imprisonment" "The statute is aimed at places intended to be utilized for a continuing prohibited purpose and a single or isolated instance of misconduct does not suffice to establish a violation." (*People v. Vera* 69 Cal.App.4th 1100, 1102.) However, "section 11366 does not require that the place be maintained for the purpose of selling; it can be violated without selling, merely by providing a place for drug abusers to gather and share their experience." (*People v. Green* (1988) 200 Cal.App.3d 538, 544.)

Here, the evidence supports a conviction under section 11366 on either a direct liability theory or an aiding and abetting theory. Defendant, a methamphetamine user, owned and lived at the property. Leslie, a methamphetamine user and seller, had lived on the property with defendant for over a year. Defendant left Leslie in charge of maintaining and protecting the property when he was away. Leslie had full access to defendant's home and would use the home, and specifically defendant's bedroom, to sell drugs. Occasionally, Leslie would give defendant methamphetamine and sometimes they would do drugs together.

Defendant's son Matthew and Matthew's girlfriend Tabatha also lived on the property, as well as defendant's son Danny. Defendant knew that Matthew and Tabatha were both methamphetamine users. Matthew told officers he bought his drugs on the property. Tabatha usually got her methamphetamine from Matthew, who usually got it from his father or Leslie. Matthew reported there was significant traffic to the property, "all hours of the day and night." Danny confirmed that traffic to the property increased when Leslie moved into the trailer. Both Matthew and Tabatha were aware Leslie was selling drugs from the property.

Although defendant denied it, there was also evidence that he knew Leslie both used and sold methamphetamine. Defendant lived at the property. Others who lived at the property, including defendant's son and the son's girlfriend, knew Leslie was selling methamphetamine from the property. Leslie sometimes supplied defendant with methamphetamine. There were significant quantities of methamphetamine found in various places on the property, including in defendant's bedroom. There were also various indicia of sales activity, including scales and packaging materials, also in various places on the property. It is reasonable to infer that defendant also knew Leslie was selling methamphetamine from the property.

These facts support a conviction of defendant under a direct liability theory, that is that he himself "opened" and "maintained" his property for the purpose of "selling, giving

away, or using" methamphetamine. (See *People v. Cannon* (1957) 148 Cal.App.2d 163, 168 [regarding the predecessor statute, § 11557 (Stats. 1972, ch. 1407, § 2, p. 2988)]; *People v. Bettencourt* (1931) 115 Cal.App. 387, 390 [regarding similar statute involving liquor sales].) It is certain he provided "a place for drug abusers to gather and share their experience." (*Green, supra*, 200 Cal.App.3d 538, 544.)

These facts also support a conviction on an aiding and abetting theory of liability. Leslie was the authorized caretaker of the property and he opened and maintained it for his methamphetamine sales. Defendant knew Leslie was selling methamphetamine from his property, and he knew Leslie was supplying others on the property with methamphetamine. Not only did defendant not stop the activities, he joined Leslie in using drugs and left Leslie in charge of protecting and maintaining the property, with full access to every area of his property, including his bedroom. Such actions by defendant facilitated Leslie's activities. Accordingly, the evidence also supported a conviction under an aiding and abetting theory of liability. Because the evidence supported a conviction under an aiding and abetting theory, the court did not err in instructing the jury.

II.

Defendant claims the trial court erred in denying his request for the benefits of sentencing under Proposition 36. Under Proposition 36, subject to certain exceptions, "any person convicted of a nonviolent drug possession offense shall receive

probation.” (Penal Code, § 1210.1, subd. (a).) Defendant contends, “[a] violation of section 11366 [opening or maintaining a place for the use or sale of methamphetamine], at least in this case, qualifies as a ‘nonviolent drug possession offense.’” We disagree.

Section 11366 provides in pertinent part: “Every person who opens or maintains any place for the purpose of unlawfully selling, giving away, or using any [specified] controlled substance . . . shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison.”

A conviction of this offense requires proof of “opening” or “maintaining” a place for a purpose proscribed by the statute. (*People v. West* (1970) 3 Cal.3d 595, 612 [decided under former section 11557].) For that reason, section 11366 is not a lesser offense included in the offense of possession of a controlled substance. (*Id.* at p. 612.)

Under Penal Code section 1210, subdivision (a), “[t]he term ‘nonviolent drug possession offense’ means the unlawful possession, use, or transportation for personal use of any controlled substance identified in Section 11054, 11055, 11056, 11057 or 11058 of the Health and Safety Code, or the offense of being under the influence of a controlled substance in violation of Section 11550 of the Health and Safety Code. The term ‘nonviolent drug possession offense’ does not include the

possession for sale, production, or manufacturing of any controlled substance."

"[T]he purpose of Proposition 36 is '[t]o divert from incarceration into community-based substance abuse treatment programs non-violent defendants, probationers and parolees charged with *simple drug possession or drug use offenses*.' [Citations.]" (*People v. Esparza* (2003) 107 Cal.App.4th 691, 695-696, italics added.) Expressly excluded from the definition of "non-violent drug possession offenses" are drug charges that are commercial in nature, i.e., "sale, production, or manufacturing of any controlled substance." (Penal Code, § 1210, subd. (a).)

Contrary to defendant's argument, he is not "precisely the type of offender at which Proposition 36 was aimed." "[T]he ballot argument in favor of Proposition 36 indicates 'the initiative was intended to exclude any defendant who was more than a "simple, non-violent drug offender:" "Proposition 36 . . . only affects those guilty of simple drug possession."' [Citation.]" (*People v. Glasper* (2003) 113 Cal.App.4th 1104, 1114.) The offense of opening or maintaining a place "for the purpose of unlawfully selling, giving away, or using any controlled substance" is not a simple possession offense. Rather, it is more like the commercial offenses expressly excluded from the provisions of Proposition 36. Because it is more like a commercial offense than a simple possession offense, we conclude that a defendant convicted of opening or maintaining

a place "for the purpose of unlawfully selling, giving away, or using any controlled substance" is not eligible for Proposition 36 sentencing.

DISPOSITION

The judgment is affirmed.

SIMS, Acting P.J.

We concur:

DAVIS, J.

HULL, J.